IN THE

Supreme Court of the United States

October Term, 1976

No. 76-58

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,

Petitioners,

-against-

SECURITIES & EXCHANGE COMMISSION, UNITED STATES OF AMERICA AS THE SECURITIES & EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORP., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC., NATIONAL CLEARING CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN
Petitioner, pro se
917 Old Trents Ferry Rd.
Lynchburg, Va. 24503

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated March 4, 1976 which affirmed the judgment of the United States District Court for the Southern District of New York that dismissed the action and to review the decision dated April 16, 1976 which amended the decision of the United States Court of Appeals for the Second Circuit and which otherwise denied the petition for a rehearing and the suggestion that the rehearing be in banc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit has been reported as *Sloan v. S.E.C.* slip op. 2377 (2d Cir. March 4, 1976) and is included as Appendix A to this petition. The decisions of the United States Court of Appeals for the Second Circuit dated April 16, 1976 which amended the prior decision of that court and which denied the petition for a rehearing and the suggestion that the rehearing be in banc are included as Appendix B and Appendix C to this petition. The oral decision rendered on February 14, 1975 by the United States District Court for the Southern District of New York, which denied various motions of the plaintiff and dismissed the action, is included as Appendix D to this petition. The judgment of the United States District Court for the Southern District of New York which was entered by the clerk of that court on February 26, 1975 is included as Appendix E to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on March 4, 1976. On April 16, 1976, this opinion was amended and a petition for a rehearing and a suggestion that the rehearing be in banc was denied. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from April 16, 1976 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Under *Goosby v. Osser,* 409 U.S. 512 (1973) did the United States District Court for the Southern District of New York err in denying the motion of the petitioners to convene a three judge court in accordance with 28 U.S.C. §2282 and 28 U.S.C. §2284 and in dismissing the action and did the United States Court of Appeals for the Second Circuit err in failing to reverse the United States District Court for the Southern District of New York and in failing to vacate the judgment and to remand the action with instructions to convene a three judge court to consider the question of the constitutionality of the Securities & Exchange Act of 1934 and the rules promulgated thereunder?

2. Did the courts below err in refusing to permit the petitioners to maintain an action based upon an amended complaint which alleged with particularity common law torts, abuses of discretion and various illegal acts committed by officers of the Securities & Exchange Commission including subordination of perjury, invasion of privacy, defamation of character, unauthorized disclosure of confidential information, disruption of the confidential relationship between attorney and client, failure to receive amendments to a broker dealer registration statement, failure to permit a broker dealer registration statement to be withdrawn, and an issuance of an "interpretation" of S.E.C. Rule 15c3-1, 17 CFR §240.15c3-1 (the broker dealer "net capital rule") contrary to the express language of the rule supposedly being interpreted?

3. Did the courts below err in holding that defendants National Quotation Bureau, Inc., Bunker Ramo Corp., National Association of Securities Dealers, Inc., Disclosure, Inc., and National Clearing Corp. are immune

from antitrust liability because their actions were taken pursuant to a scheme of securities regulation?

4. Did the courts below err in refusing to permit the petitioners to maintain an action based upon an amended complaint which alleged that defendants National Quotation Bureau, Inc., Bunker Ramo Corp. and National Association of Securities Dealers, Inc. had violated the antifraud provisions of federal securities laws in addition to the federal antitrust laws by refusing to permit the petitioners to list bid and asked quotations in the pink sheets and on the interdealer electronic quotations system known as NASDAQ in competition with other broker dealers and which further alleged that the National Quotation Bureau, Inc. had cooperated with the Securities & Exchange Commission in depriving the petitioners of their constitutional rights by, *inter alia,* refusing to accept "in name only" listings in the pink sheets and further that the Securities & Exchange Commission had also violated the antifraud provisions of federal securities laws by suspending trading in securities without giving adequate and accurate reasons therefore and by discouraging broker-dealers from entering quotations in the pink sheets?

5. Did the courts below err in permitting the amended complaint to be dismissed *sua sponte* as to Disclosure, Inc. when no motion of any kind was filed by that defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 1 states:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Article 1, Section 8, Clause 3 states:

> "Congress shall have the power. . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article II, Section 1 states:

> "The executive power shall be vested in a President of the United States of America."

Article III, Section 1, in pertinent part, states:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish."

Article III, Section 2, paragraph 1, in pertinent part, states:

> The judicial power shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made . . . ; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party. . . .

The Fifth Amendment, in pertinent part, states:

> "No person shall . . . be deprived of liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The Ninth Amendment states:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Section 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. §781(g).[1]

Section 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. §78l(k).

Section 15(c)(2) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(2).

Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(3).

Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78q(a).

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

Section 1 of the Sherman Act, 15 U.S.C. §1.

Section 2 of the Sherman Act, 15 U.S.C. §2.

Section 3 of the Clayton Act, 15 U.S.C. §14.

Declaratory Judgment Act, 28 U.S.C. §2201.

Federal Anti-Injunction Act, 28 U.S.C. §§2282, 2284.

Federal Tort Claims Act, 28 U.S.C. §2674.

RULES INVOLVED

S.E.C. Rule 10b-5, 17 CFR §240.10b-5.[2]

S.E.C. Rule 12b-7, 17 CFR §240.12b-7.

S.E.C. Rule 15c2-11, 17 CFR §240.15c2-11.

1. Because of the length of the statutory provisions involved, they are merely cited here in accordance with Rule 23(1)(d) of the Supreme Court Rules.

2. Because of the exceptional length of the rules involved, they are merely cited here in accordance with Rule 23(1)(d) of the Supreme Court Rules.

S.E.C. Rule 15c3-1, 17 CFR §240.15c3-1.[3]

S.E.C. Rule 17a-5, 17 CFR §240.17a-5.

STATEMENT OF THE CASE

On May 10, 1970, petitioner Samuel H. Sloan & Co., ("Sloan & Co."), of which petitioner Samuel H. Sloan ("Sloan") is the sole proprietor, became registered as a broker dealer with the Securities & Exchange Commission ("S.E.C."). On June 26, 1970, Sloan & Co. became a subscriber to the "pink sheets" and the "yellow sheets" published by the National Quotation Bureau, Inc. ("NQB") and thereafter became a market maker in numerous over-the-counter securities, often trading more than a hundred at one time. Being a "market maker" in over-the-counter securities is an inherently risky proposition in which a broker or dealer quotes bid and asked prices to other brokers and dealers on a continuous basis and stands prepared at all times to buy or sell at least one hundred shares on the bid or the asked price of the security in which the market is being made.

In 1971, the NASDAQ system, which is an electronic interdealer quotations system on which over-the-counter markets are made, came into being. This system was operated by Bunker Ramo Corp. in accordance with a contract with the National Association of Securities Dealers, Inc. ("NASD") which required that Bunker Ramo Corp. refuse to deal with or lease Level III of the system to any broker or dealer who was not a member of the NASD.

3. The full text of Rule 15c3-1, along with changes currently proposed by the Securities & Exchange Commission, occupies forty-four (44) pages of the CCH Federal Securities Law Reporter. This rule has been amended on more occasions than can be readily ascertained including many times during the period in which this lawsuit has been pending.

As a result Sloan, who had not joined the NASD, was prohibited from making markets on the NASDAQ system.

Also in 1971, the National Clearing Corp., a wholly owned subsidiary of the NASD, was formed. The National Clearing Corp. provides a securities clearing service for members banks and brokers. In 1972 and 1973, Sloan attempted to join the National Clearing Corp. but was never permitted to do so.

On December 13, 1971, S.E.C. Rule 15c2-11, 17 C.F.R. §240.15c2-11 came into effect. This rule, which is lengthy, convolved, provides for numerous exceptions and can be waived at the discretion of the S.E.C., has the effect among others of making it illegal for a broker or dealer to resume the publication of quotations in a security which has not been actively quoted or which has been suspended by the S.E.C. unless, among other things, the broker or dealer possesses financial information concerning the issuer of the security such as a copy of a 10-K report of the issuer which is currently on file with the S.E.C. A 10-K report is an annual report required by the rules of the S.E.C. promulgated under §12(g) of the Securities Exchange Act of 1934 ("Exchange Act") to be filed by certain issuers of securities. When a 10-K report is tendered to the S.E.C. for filing, Rule 12b-7, 17 CFR §240.12b-7, requires that it be accompanied by a fee of $250.

After rule 15c2-11 came into effect, the NQB, in an apparent effort to cooperate with the S.E.C., established policies among them the policy of refusing to accept an initial listing for any security which had previously not been actively quoted or which had been suspended by the S.E.C. even though the broker or dealer proposing to list this security was willing to agree not to publish an actual bid or an asked quotation. Since such listings were not prohibited

by Rule 15c2-11, and since the NQB operated a monopoly, this policy closed a loophole which otherwise would have enabled certain securities to be publically traded even though the issuers of those securities had not filed a 10-K report or any other financial information with the S.E.C. and consequently had not paid any fees to the S.E.C. since the filing of all of the financial reports specified in Rule 15c2-11 require the payment of a fee to the S.E.C.

On October 27, 1972, the S.E.C. entered into a contract with Disclosure, Inc. which granted to Disclosure, Inc. a monopoly over the reproduction for sale to the public of all 10-K reports and other documents on file with the S.E.C.

On June 27, 1974, Sloan commenced this action by filing a complaint which named the S.E.C. as the sole defendant. This complaint sought declaratory relief declaring Rule 15c2-11 and Sections 15(c)(5) and 19(a)(4) of the Exchange Act to be unconstitutional. Sections 15(c)(5) and 19(a)(4) of the Exchange Act authorized the S.E.C. summarily to suspend trading in any security. Sloan summed up his complaint by stating that he should be "permitted to buy and sell any security" and that he should be "permitted to list any security by name in the pink sheets."

In response to this complaint, the S.E.C. filed an answer dated August 23, 1974. At a pre-motion conference in September, 1974, the Court advised the plaintiff that the complaint as drafted was too vague and lacking in specifics and gave directions to the plaintiff as the requirements for an amended complaint. Subsequently, the plaintiff moved for leave to file an amended complaint and the Court granted this motion in the absence of opposition by the S.E.C. An amended complaint was, in fact, filed on October 22, 1974.

The amended complaint added a new plaintiff, Sloan &

Co., and six new defendants: United States of America as the Securities & Exchange Commission, the NQB, Bunker Ramo Corp., the NASD, Disclosure, Inc., and the National Clearing Corp. All parties were served and all but defendant United States of America as the Securities & Exchange Commission filed answers. Following a pre-motion conference on January 10, 1975, the Court directed that all motions to dismiss and other motions to be filed by the defendants should be filed by January 31, 1975. The Court further directed that there would be no discovery until these motions were decided.

Following this pre-motion conference, the S.E.C. moved to dismiss under Rules 12b-1 and 12b-6 Fed.R.Civ.P. and for summary judgment. The NASD, the National Clearing Corp. and Bunker Ramo Corp., appearing together, moved for dismissal and for judgment on the pleadings pursuant to Rule 12(b) and (c) Fed. R. Civ. P. and Rule 9 of the General Rules for the Southern District of New York. The NQB moved for judgment on the pleadings pursuant to Rule 12(c) Fed. R. Civ. P. The plaintiff cross moved (1) for a preliminary and permanent injunction enjoining the S.E.C. from instituting and prosecuting actions for injunctive relief, from promulgating and enforcing rules and regulations, from conducting investigations, and from undertaking any acts or practices under the color of the Securities Exchange Act of 1934 and other statutes and rules, (2) for summary judgment or judgment on the pleadings as to the S.E.C. pursuant to Rule 56 Fed. R. Civ. P., (3) for convening of a three judge constitutional court pursuant to 28 U.S.C. §2282 and 28 U.S.C. §2284, (4) for an order requiring the appearance of the office of the U.S. Attorney or, in the alternative, for a default judgment against the United States of America pursuant to Rule 55 Fed. R. Civ. P. and (5) for an order

disqualifying Dennis C. Hensley, Lloyd J. Derrickson, Robert Woldow, George W. Brandt, Jr., and Thomas L. Taylor, III from appearing as counsel for the various defendants. Furthermore, the plaintiff moved for a preliminary injunction enjoining the NQB from refusing to list his name in the "pink sheets" under any security. On February 14, 1975, following an argument of which a stenographic record was made, the court made an oral decision which granted all of the motions of the defendants and denied all of the motions of plaintiff and, in addition, dismissed *sua sponte* the complaint as to defendant Disclosure, Inc. Plaintiff then moved for reargument. This motion was denied. Following the denial of the motion for reargument, a final judgment was entered against plaintiff. An appeal to the United States Court of Appeals for the Second Circuit followed.

On March 4, 1976, in an opinion which is included as Appendix A to this petition, the Court of Appeals affirmed the judgment of the District Court. On April 16, 1976, this opinion was amended slightly and a petition for a rehearing and a suggestion that the rehearing be in banc was denied. The petitioner now requests that a writ of certiorari issue to review these decisions.

The amended complaint which Sloan filed in the District Court is 40 pages long and contains 309 numbered paragraphs. Paragraphs 1-263 set forth with particularity a variety of facts and circumstances which form the basis to the claim for relief. The remaining paragraphs contain five counts. The opinion of the Court of Appeals correctly summarized certain of the averments made in the numbered paragraphs of Count I, which attacked the constitutionality of the Exchange Act and rules promulgated thereunder, when it said:

> "Sloan argues that the Act and rules constitute an unconstitutional delegation of legislative power; are overly vague; deprive him of liberty and property without due process of law; and exceed congressional power under the commerce clause."

These arguments are based upon Article 1, Section 1; Article 1, Section 8, Clause 3; Article II, Section 1; Article III, Section 1; and the Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

In addition, as the Court of Appeals noted, Count I attacks on constitutional grounds the validity of certain specific provisions of the Exchange Act, including §27, 15 U.S.C. §78aa, which vests in the federal district courts exclusive jurisdiction over actions based upon the Exchange Act, §12(g), 15 U.S.C. §78l(g), which concerns the requirement that the issuers of certain publically held securities file financial information with the S.E.C., and §§15(c)(s) and 19(a)(4), which have since been consolidated to become §12(k) of the Exchange Act, 15 U.S.C. §78l(k), which authorizes the S.E.C. summarily to suspend trading in any security. Moreover, Count ! attacks the validity of S.E.C. Rules 15c2-11, 15c3-1, 17a-5 and 12b-7, 17C.F.R. §§240.15c2-11, 240.15c3-1, 240.17a-5, 240.12b-7.[4]

Although the Court of Appeals was essentially correct in its description of the averments contained in Count I of the amended complaint, it ignored Count II of the amended complaint. That Count alleges the "several common law torts" to which the Court of Appeals referred in the first paragraph of its opinion, and in addition alleges abuses of

4. The amended complaint does not cite Rule 12b-7 by number. However, ¶273 of the amended complaint avers that the "rules which require the filing of Forms 10-K and 10-Q with the S.E.C. together with the filing fees, are unconstitutional . . ." Rule 12b-7 is the rule which sets forth the fees which must be paid.

discretion and illegal activities by the S.E.C. and officers thereof. This Count, which "seeks money damages and declaratory relief declaring certain specific acts of the S.E.C. to be and have been unconstitutional and to be and have been arbitrary, capricious, and an abuse of delegated authority," (see ¶276 of the amended complaint), incorporates by reference the earlier paragraphs in the complaint, including paragraphs dealing with the policies of the S.E.C. in suspending trading in securities, as well as specific suspensions of securities (See ¶¶ 60-90, 145-182, 189-190, 193-206, 216-217, 222-229 of the amended complaint).[5] It then avers that the suspension of each of the 28 securities listed in ¶145 of the amended complaint, in all of which Sloan was a market maker, was "unconstitutional as well as arbitrary, capricious and an abuse of delegated authority" and that Sloan was injured as a result of these suspensions. This count also avers that Sloan was aggrieved by an S.E.C. interpretation of Rule 15c3-1 dated June 8, 1973, which is referred to in ¶227 of the amended complaint, since this interpretation had the effect of limiting the amount of business Sloan could do. Additionally, this count avers that the act by an officer of the S.E.C. of calling Sloan's mother and asking her questions concerning Sloan's financial affairs, as alleged in ¶142 of the amended complaint, as well as other acts amounting to subordination of perjury as alleged in ¶143 of the amended complaint, and still other acts involving the accosting of Sloan's secretary and refusing to permit her to leave his office, as alleged in ¶140 of the amended complaint, deprived Sloan of his right to privacy and other constitutional rights. Count II additionally avers that the

5. It can thus be seen that much of the amended complaint is devoted to setting forth specific facts which purport to demonstrate the unconstitutionality of the power to suspend trading in a security. This is also what the initial complaint dealt with primarily.

activities set forth in ¶¶257-262 of the amended complaint, which alleged that under the pretext of a routine broker dealer inspection, an investigator for the S.E.C. had entered Sloan's office and had required Sloan to produce and provide photocopies of all correspondence exchanged with his attorney as well as copies of all cancelled checks paid to his attorney, violated Sloan's right to enjoy a confidential attorney-client relationship, and that the failure of the S.E.C. to accept broker-dealer filings as alleged in ¶¶ 4, 6, 99, 137, 138, 248 and 253 of the amended complaint as well as the refusal to permit Sloan to withdraw as a broker dealer was arbitrary, capricious, an abuse of delegated authority and unconstitutional.

Count III, with which the opinion of the Court of Appeals does deal, although in a rather cursory fashion, alleges violations of federal antitrust law. This count charges, *inter alia*, the NQB with actual monopolization since it "operates the pink sheets which is a monopoly" and defendants NASD and Bunker Ramo Corp. with making contracts in restraint of trade. The complaint alleges that the NQB at various times has refused to list Sloan's bid and asked and name only quotations in securities in the pink sheets and in addition has imposed a rate structure which places a disproportionate financial burden on the market makers. Sloan's complaint against the NASD alleges that it has entered into a contract with Bunker Ramo Corp. which requires that Bunker Ramo Corp., the owner and operator of the NASDAQ system,[6] refuse to deal with Sloan by refusing to permit Sloan to subscribe to and make markets on Level III of the NASDAQ system.[7]

6. While this action was pending on appeal Bunker Ramo Corp. sold the NASDAQ system to the NASD.

7. The operations of the NASDAQ system were the subject of the decision in *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 509 F. 2d 147 (5th Cir. 1975) *cert. denied* ____ U.S. ____ (Oct. 16, 1975).

Count IV of the amended complaint, which was not discussed in the opinion of the Court of Appeals, alleges a violation of the antifraud provisions of federal securities laws. The District Court characterized this count as "particularly irrational." (App. 17a). This count charges the NASD and Bunker Ramo Corp. with committing acts of fraud "by not permitting Sloan to make markets on NASDAQ, by reducing investor liquidity, by causing the negotiated market system to cease to function, and by charging excessive rates to participants in NASDAQ thereby causing many broker dealers to stop making market[s]." It also accuses the NQB of committing "fraudulent acts by refusing to permit Sloan to list his markets in the pink sheets and the yellow sheets, by rejecting quotation cards unless a Form 211 has been provided, and by cooperating with the S.E.C. in depriving Sloan of his constitutional rights." Finally, this count alleges that the S.E.C. has fraudulently suspended trading in securities and has discouraged brokers and dealers from entering quotations in the pink sheets.

Count V of the amended complaint alleges slander and defamation of character and the unauthorized release of confidential information by the S.E.C.

The ad damnum of the amended complaint demands declaratory relief as well as a judgment in the amount of $29,600,000.[8]

As the opinion of the Court of Appeals notes, while the appeal was pending, Sloan & Co's registration as a broker dealer in securities was revoked and Sloan was barred from being associated with any broker or dealer by an ad-

8. This figure is arrived at after trebling the damages in the antitrust count and after other computations which do not present any legal issue relevant to this petition.

ministrative order of the S.E.C., see *Samuel H. Sloan,* Securities Exchange Act, Release No. 11376 (April 28, 1975), 6 SEC Docket 772. Sloan has also been sued twice by the S.E.C. and in the course of the second of these two suits, which is still continuing, the S.E.C. succeeded in having Sloan incarcerated for two days in the Metropolitan Correctional Center in New York City. These events were the subject of a recent Court of Appeals decision which is included as Appendix F to this petition. Sloan is currently attempting to have the administrative order of the S.E.C. set aside and on May 24, 1976 filed a brief in the Court of Appeals which contends, *inter alia,* that the order of the S.E.C. is an unconstitutional bill of attainder under *United States v. Lovett* 328 U.S. 303, 314-318 (1946). The S.E.C. has obtained a total of three months until August 20, 1976 to file its answering brief and the Court of Appeals has ordered that the argument of that proceeding be ready to be heard during the week of September 1, 1976. Sloan is also currently attempting in the Court of Appeals to have three of his appeals from civil injunctions obtained by the S.E.C. reinstated following their dismissal on January 7, 1976. On June 23, 1976, Mr. Justice Marshall extended the time to petition for a writ of certiorari in those three appeals until September 10, 1976.[9]

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9. Mr. Justice Marshall did not extend the time to file a petition for a writ of certiorari in the instant case, however, nor was any extension of time requested. The time to petition for a writ of certiorari was extended in cases docketed in the Court of Appeals under numbers 74-1436, 75-7046 and 75-7056. Another petition for a writ of certiorari is currently pending in this Court under docket no. 75 1901 in a case decided as *Sloan v. Canadian Javelin Ltd.*, (2d Cir. Feb. 6, 1976). Still another petition for a writ of certiorari was denied by this court on June 14, 1976 from *Sloan v. S.E.C.* 527 F. 2d 11 (2d Cir. 1975).

REASONS FOR GRANTING THE WRIT

No valid claim could seriously be made that Sloan lacks standing to sue the S.E.C. In addition, although the amended complaint could perhaps have been more artfully pleaded, the Court of Appeals did not find it to be insufficient. Thus, the problems which frequently vex litigants who wish to challenge the constitutional validity of legislative acts do not affect Sloan here. As a result, one of the questions presented in this petition is whether an action which, the Court of Appeals said, "challenges the legality of the entire structure of securities regulation in the United States" can be maintained in the federal courts. This question is one of obvious importance which requires the granting of this petition.

Rule 19(1)(b) of the Supreme Court Rules sets forth reasons which this Court might consider in deciding whether to grant a petition for a writ of certiorari. It is clear that many of these reasons apply here. The opinion of the Court of Appeals, which is devoted primarily to attacking Sloan personally and to making a mockery of his lawsuit, can fairly be said to have "so far departed from the accepted and usual course of judicial proceedings" that for this reason alone this petition should be granted. Moreover, the opinion of the Court of Appeals is in clear conflict with applicable decisions of this court. Under *Goosby v. Osser,* 409 U.S. 512, 518 (1973), the Court of Appeals had no jurisdiction to decide the question of the constitutional validity Exchange Act and the rules promulgated thereunder, and instead was required to remand the action to the district court with instructions to convene a three judge court. This point is also apparent from *Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90, 100-101 (1974). To be sure, the exception

provided for in *Goosby v. Osser* 409 U.S. at 518 arises where the constitutional attack is "frivolous" which seems to provide the loophole which the Court of Appeals seized upon to permit its decision here. However, decisions of this Court do not permit the term "frivolous" to be applied in an arbitrary manner by a Court of Appeals because "frivolous" has been defined to mean specifically that the argument is foreclosed by analogeous Supreme Court decisions. See *Goosby v. Osser, supra* at 518; see also *Sugar v. Curtis Circulation Co.*, 377 F. Supp. 1055, 1061 (S.D.N.Y. 1974) *rev'd sub. nom. Carey v. Sugar* —— U.S.——, 47 L. Ed. 2d 587 (March 24, 1976). Here, the Court of Appeals did not and could not have cited analogeous Supreme Court cases which foreclose Sloan's constitutional claims for, as Professor Loss has noted, the Supreme Court has never considered the question of the constitutionality of the Exchange Act. See L. Loss, Securities Regulation Vol. 1 p. 178 n. 1.10

The only supposedly analogeous case which the Court of Appeals was able to cite was *The Moses Taylor* 71 U.S. (4 Wall) 411, 428-430 (1867) and even reliance on that case, which was not cited by any of the parties or by the District Court, was misplaced since it delt with admiralty law and Article III Section 2 paragraph 1 of the Constitution vests in the federal courts power over "all cases of admiralty and maritime jurisdiction."

This Court's recent decision of *Singleton v. Wulff*, No. 74-1393, decided July 1, 1976, slip op. 12-14 makes it clear that a court of appeals cannot do precisely what the court

10. Naturally, reliance on this authority should not be taken to mean that the petitioner agrees with the conclusion Loss expresses that: "The question of constitutionality of the SEC statutes generally belongs to a bygone day."

of appeals did here. With respect to Sloan's challenge to the constitutionality of §12(g) of the Exchange Act, 15 U.S.C. §78l(g), the district court said that Sloan lacked standing to sue. (App. 13a). The court of appeals apparently reversed on that point and then proceeded to decide that §12(g) was not unconstitutional. See slip op. at 2380 n. 4. This clearly cannot be permitted and again this demonstrates that this petition should be granted.

The opinion of the Court of Appeals is also palpably erroneous in its statements concerning Sloan's allegations that certain defendants violated antitrust law. Sloan's right to maintain this suit is established by *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). There exists no specific provision of the Exchange Act which could be construed, even by implication, to repeal the antitrust laws.11 Again, the reliance by the Court of Appeals is misplaced. In *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) this Court arrived at its decision because of

11. In the District Court, the NASD argued that §15A(n) of the Exchange Act, 15 U.S.C. §78o-3(n), contained an implied repeal of the antitrust laws. However, that section was itself repealed by the Securities Acts Amendments of 1975. Moreover, one of the two Senate reports which explained the reasons for the repeal said that §15A(n) was "superfluous and unnecessary" because of the "prevailing case law interpreting this section," namely *Harwell v. Growth Programs*, 451 F. 2d 240 (5th Cir. 1971), *rehearing denied*, 459 F. 2d 461 (5th Cir. 1972), *cert. denied*, 409 U.S. 876 (1972), and the standards enunciated by the Supreme Court in *Silver v. New York Stock Exchange, supra*, and *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289 *rehearing denied*, 410 U.S. 960 (1973). See *Report of the Senate Banking Committee*, S. Rep. No. 93-865, 93rd Cong. p. 11 (1974). This report also states unequivocally that "the Committee does not intend thereby to confer general antitrust immunity on the self-regulatory organizations with respect to conduct subject to the S.E.C.'s oversight."

Although the proposed amendments to the Exchange Act failed to pass in 1974, substantially the same bill became the law on June 5, 1975. The Senate Report there stated: "The bill is designed to eliminate all traces of [the S.E.C.'s] inappropriate regulatory interference with legitimate competitive forces." See Senate Report No. 94-75, 94th Cong., 1st Sess. (1975) p. 67.

a specific provision in the Exchange Act which gave the S.E.C. the authority to fix commission rates. 422 U.S. at 685. None of the defendants here pointed to any specific provisions which covered the activities of the various defendants which are alleged in the complaint. In fact, ¶ 191 of the amended complaint alleges, and the NQB admitted in its answer, that the S.E.C. does not have the authority to regulate the NQB.[12] Similarly, the regulatory authority which the court found to be conclusive *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 732-735 (1975) is not involved here where, for example, the S.E.C. has never expressed an interest in the policies of the NASD regarding whom to admit to the NASDAQ system.

From this it is apparent that the decision of the Court of Appeals is in conflict with a long line of Supreme Court decisions including *Ricci v. Chicago Merchantile Exchange*, 409 U.S. 289, 302-303 n. 13 (1973) which said precisely the contrary of what the District Court said it said. (See App. 16a). In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), this Court reiterated the principle which it has set forth many times when it said "repeals of the antitrust laws by implication

12. However, the Securities Acts Amendments of 1975 subsequently changed that and now the S.E.C. has the authority to promulgate rules which would bring the NQB within its regulatory jurisdiction. Although no such rules have yet been promulgated, there can be no doubt that this new provision of law would have a chilling effect on any desire the NQB might have to act in a manner inconsistent with the express wishes of the S.E.C. This, of course, puts the S.E.C. in the best of all possible worlds and injures Sloan since the S.E.C. has the de facto power to control the actions of the NQB without being required to set forth rules letting the NQB know what it can and cannot do. Sloan is aggrieved by this arrangement because he would like to be able to list securities in the pink sheets freely without having to worry about S.E.C. rules governing the subject and without having to worry about arbitrary and covert S.E.C. actions directed at him personally.

from a regulatory statute are strongly disfavored, and will be found only in cases of plain repugnancy between the antitrust and regulatory provisions." Here, where there are no regulatory provisions, it is obvious that there can be no repeal of federal antitrust laws and therefore the Court of Appeals is in error.

Finally, the decision of the District Court to dismiss those counts of the complaint which were not discussed in the decision of the Court of Appeals is in conflict with decisions of this court in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Screws v. United States*, 325 U.S. 91 (1945); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949); and *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). Moreover, since the private party defendants submitted affidavits and exhibits in support of their motions to dismiss, the decision of the District Court is in conflict with this Courts opinion in *Carter v. Stanton*, 405 U.S. 669, 671 (1972) which requires that such a motion be treated as one for summary judgment.

ARGUMENT

It should be noted that the opinion of the Court of Appeals makes a number of unfair, prejudicial and inaccurate statements concerning Sloan personally. For example, it says that Sloan was a "fugitive from justice" although there has yet to be a judicial fact finding that this was the case. Moreover, contrary to the impression left by the decision of the Court of Appeals, there have never been any federal criminal proceedings whatever instituted against Sloan. Additionally, although the S.E.C. has accused Sloan in civil proceedings of violating its rules, the

Court of Appeals, by *sua sponte* and summarily dismissing three Sloan appeals, refused to adjudicate the question of whether this had, in fact, occurred. Also, the decision of the Court of Appeals intimates the view that Sloan is something of a trouble maker for bringing a number of appeals to that court, but, with one exception, all of the cases listed involved action initiated by the S.E.C.13 Moreover, the Court of Appeals fails to point out that again with one exception, that being *Sloan v. S.E.C.* 527 F.2d 11 (2d Cir. 1975), all of the cases cited were disposed of by summary order. Thus, what is involved here is a consistant refusal by the Court of Appeals to pass upon a number of substantial legal questions presented by Sloan and not a series of frivolous applications.

In Footnote 5 of its opinion, the Court of Appeals again unfairly criticizes Sloan. It says: "For example, Sloan argues that the S.E.C. 'is a suable entity' and that the district court had jurisdiction while the district court did not mention either problem." Actually, during the oral argument which immediately proceeded the decision of the District Court, the attorney for the S.E.C. argued vigorously that the S.E.C. could not be sued and that the District Court did not have jurisdiction, see Tr. 19-25. The briefs filed by the S.E.C. in the District Court and in the Court of Appeals also advanced both of these arguments. Thus, Sloan was merely responding to what the S.E.C. said.

13. The exception is *Sloan v. Canadian Javelin Ltd.*, Docket No. 75-7096 (2d Cir. Feb. 6, 1976). The case of *Sloan v. Ward*, Docket No. 75-3001 (2d Cir. Jan. 16, 1975) was a petition for a writ of mandamus to the Hon. Robert J. Ward which was filed after Judge Ward arranged to have a civil injunction action which was instituted by the SEC assigned to himself in contravention of Rule 4(A) of the Calendar Rules for the Southern District of New York which provides that "all civil actions and proceedings shall be assigned by lot to one judge for all purposes" and after Judge Ward had entered a "temporary restraining order" which contained a mandatory injunction requiring Sloan to make his books and records "easily accessible" to the S.E.C.

The Court of Appeals further criticizes Sloan for arguing "that certain attorneys should have been disqualified because they were not members of the bar of the Southern District", although the merit of that argument should be obvious,14 and for arguing and that the Securities Acts Amendments of 1975 require a remand to the District Court, although this Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) and *Fusari v. Steinberg*, 419 U.S. 379 (1975), which Sloan cited, clearly compel that result.

In conclusion, the Court of Appeals threatens Sloan with double costs and attorneys fees, cf. *Oscar Gruss & Son v. Lumbermans Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970),15 if Sloan bothers them again and thereby rounds out a decision which should be beneith the dignity of a body such as the United States Court of Appeals for the Second Circuit.

It is interesting to observe that although the Court of Appeals criticized Sloan for prosecuting this appeal, it did not, in general, adopt the arguments advanced by the appellees. A total of five briefs were put in by the appellees to this appeal but none of them cited *The Moses Taylor*, *supra* and only the brief for the NASD cited *United States v. National Association of Securities Dealers, Inc. supra*

14. Sloan also argued that the attorney for the NQB should have been disqualified because he had previously worked for the S.E.C. and had there been in charge of prosecuting Sloan. These arguments, however, are not included in the questions presented in this petition since the immediate concern of the petitioner is to get this case back in court. However, it should be pointed out that Sloan argued that all of the attorneys who filed motions to dismiss were disqualified for one reason or another and had the Court of Appeals agreed with this argument, the order granting the motions to dismiss would have had to be vacated.

15. An examination of the lawback on the original typewritten opinion handed down here shows that the author of this "*per curiam*" opinion also wrote the opinion in *Lumbermens Mutual Casualty Co.*

and *Gordon v New York Stock Exchange, supra.* The reasons for which the NQB and Disclosure, Inc. did not and could not have relied on those two decisions are obvious and, in fact, Sloan relied upon them in his brief.

For that matter, the citation by the Court of Appeals to *The Moses Taylor, supra* was inappropriate. That decision turned upon presence of the word "all" three times in Article III, Section 2, paragraph 1 of the Constitution which, in pertinent part, states:

> The judicial power shall extend to *all* cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, . . . to *all* cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party . . . " (emphasis supplied)

If the reasoning behind Mr. Justice Field's explanation for his decision in *The Moses Taylor, supra,* 71 U.S. at 429, still holds, the logical result is that one can sue the United States in a state court, because the word "all" is dropped before the word "controversies" in the passage of the Constitution just quoted, whereas if one wants to sue to have a state law declared unconstitutional one must file such a suit in the federal courts. In short, if this logic can be held to apply today, the result would be to uproot a great many Supreme Court decisions including some which are extremely recent.

By now it should be obvious from what has been said that there are a number of things wrong with the decision of the Court of Appeals sought to be reviewed. Many points have been neglected, however, since they cannot be expounded upon within the scope of this petition.[16] Although Sloan

16. Rule 19(1)(h) of the Supreme Court Rules requires a "direct and concise argument."

argued in the District Court that the Exchange Act and the rules promulgated thereunder were unconstitutional, controlling decisions of this Court prohibit the Court of Appeals from adjudicating the merits of Sloan's constitutional claims since this is required to be done by a three judge district court in the first instance. The only exception arises when the constitutional questions presented are plainly frivolous which is not the case here. For example, S.E.C. Rules 15c2-11 and 15c3-1 clearly do not meet the constitutional test set forth in *Connally v. General Construction Co.* 269 U.S. 385, 391 (1926) which requires that a statute must not be "so vague that men of common intelligence must necessarily guess at its reasoning and differ as to its application . . . " The existance of scores of attorneys who charge substantial fees for writing opinions on the application of innumerable S.E.C. rules and regulations demonstrates that "men of common intelligence" and even most members of the bar cannot figure out what these rules mean.

It can also be seen that one of the rules involved is invalid on grounds which do not depend upon the resolution of a constitutional question. S.E.C. Rule 15c2-11 was supposedly promulgated under §15(c)(2) or the Exchange Act, 15 U.S.C.§78(c)(2). However, by comparing §15(c)(2) with Rule 15c2-11 one can readily observe that they bear no relation to each other. Consequently, it is obvious that the S.E.C. has bootstrapped itself into taking jurisdiction over an area in which Congress has given it no authority to act.

Many of Sloan's arguments with respect to the constitutionality of the Exchange Act have already been set forth in Sloan's petition for a writ of certiorari in *Sloan v. S.E.C. Docket No. 75-1507 cert. denied* June 14, 1976 and

will not be repeated here.[17] However, there are a number of other arguments which have been presented in this case and not in this Court previously including the argument that under *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) the broker dealer registration requirement is unconstitutional and that under *Jones v. S.E.C.*, 298 U.S. 1 (1936), Sloan was deprived of his constitutional right to withdraw as a broker dealer in securities.

In the Court of Appeals, the only time the S.E.C. addressed the merits of Sloan's constitutional arguments was in one sentence on p. 16 of its brief which said:

> "Financial responsibility regulations of this kind, designed to protect the public are, of course, common place at both the state and federal levels with respect to financial institutions of all kinds and any discussion of their constitutionality is superfluous."

Actually, in *California Bankers Association v. Schultz*, 416 U.S. 21 (1974), various justices of this Court rendered lengthy opinions which delt with arguments similar and in some case identical to those advanced by Sloan and arrived at an inconclusive result. This demonstrates that a discussion of Sloan's constitutional arguments would be anything but superfluous. For example, Sloan contends that the broker dealer reports required by Rule 17a-5, 17 CFR §240.17a-5, are unconstitutional under the "required records" standards set forth in such cases as *Shapiro v. United States*, 335 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 31, 57 (1968); and *Grosso v.*

17. The Court, of course, intimated no view on the merits by denying Sloan's petition there and if this petition is granted this Court can well consider all the constitutional arguments Sloan has raised.

United States, 390 U.S. 62 (1968); that the unauthorized entries into his office, which are alleged in the complaint, are unconstitutional under *See v. City of Seattle*, 387 U.S. 541, 543 (1967); and that the challenged rules were promulgated by the S.E.C. in an unconstitutional delegation of authority as explained in *Schechter Poultry Co. v. United States*, 295 U.S. 495, 529 (1936); *Panama Refining Co. v. Ryan* 293 U.S. 388, 430 (1935); *National Cable Television v. United States* 415 U.S. 336, 342 (1974); and *Federal Power Commission v. New England Power Co.* 415 U.S. 345, 350 n. 4 (1974). It should be noted that this Court recently expressed agreement with Sloan's views when, in *Ernst & Ernst v. Hochfelder* ——U.S.——, 47 L.Ed. 2d 668, 688 (March 30, 1976), it stated:

> The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law, rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."

With respect to the rules spe ifically challenged in Sloan's complaint, it is obvious that they are "laws" and that they were not passed by Congress and signed by the President but rather were, in all likelyhood, "passed around" and finally "tossed on" a table, indicating approval. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 767 (1975) (Blackmun, J., dissenting). Clearly, this is unconstitutional.

It has long been established that an individual such as Sloan has the constitutional right to engage in private enterprise free from unreasonable governmental interference. See *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Although Congress may require a business entity to

keep records and make reports, *United States v. Morton Salt Co.*, 338 U.S. 632, 647-651 (1950), they must be reasonably related to a specific purpose. *Shapiro v. United States*, 335 U.S. 1, 32 (1948); *Yakus v. United States*, 321 U.S. 414, 424 (1944); *United States v. Darby*, 312 U.S. 100, 125 (1941). The S.E.C. has yet to explain what specific purpose is served by the records and reports required by rules 15c2-11 and 17a-5. Moreover, the records and reports required by these rules are not ones that would "customarily" be kept, they do not have a "public aspect" and, since §32 of the Exchange Act, 15 U.S.C. §78ff, provides for criminal penalties, these records and reports do not arise out of an "essentially non-criminal and regulatory area of inquiry." Hence, it is apparent that under *Marchetti v. United States*, 390 U.S. 39, 57 (1968), the rules Sloan is challenging here are unconstitutional. Additionally, in order to be constitutional, the rules must be sufficiently clear as to satisfy the familiar due process requirement of adequate notice, see *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951), *rehearing denied*, 341 U.S. 956 (1951); *Bouie v. Columbia*, 378 U.S. 347, 351 (1964), and *Coates v. Cincinnati* 402 U.S. 611, 614 (1971). A reading of the rules themselves reveals that this is not the case.

It should be noted that at least one aspect of the regulatory scheme which the Court of Appeals held to give the NASD and others an implied immunity from antitrust liability is unconstitutional under analogeous case law. Senate Report No. 94-75, 94th Cong., 1st Sess., explains that provisions of the Securities Acts Amendments of 1975 transform the NASD from a trade association into a de facto branch of the federal government. It was expressly held in *Schechter Poultry Co. v. United States*, 295 U.S.

495, 537 (1936) that such an arrangement is unconstitutional.

Although the incorrectness of the decision of the Court of Appeals has by now been amply demonstrated, something should be said about the arguments advanced by the appellees in the Court of Appeals. To begin with, the Court of Appeals ignored almost everything the appellees said or else decided that these arguments had no merit. It has already been pointed out that the S.E.C. argued that the S.E.C. cannot be sued and that a district court has no jurisdiction over the S.E.C. Similarly, a plethora of arguments were advanced by the other appellees. However, these arguments will not be discussed here since they form no apparent basis for the decision of the Court of Appeals and since, if the appellees wish to press their arguments here, they must file a cross petition for a writ of certiorari. See *United States v. Reliable Transfer Co.* 421 U.S. 397, 401 n. 2 (1975).

However, some discussion should be made of Sloan's case against defendants National Clearing Corp. and Disclosure, Inc. Sloan complains that the National Clearing Corp. did not permit him to join. See ¶ 44 of the amended complaint. The National Clearing Corp. is a wholly owned subsidiary of the NASD, see ¶ 47, and claimed antitrust immunity similar to that claimed by the NASD. Since there is no rule subject to S.E.C. approval which governs the activities of the National Clearing Corp. which are alleged here, it is obvious that there is and can be no implied or actual repeal of the antitrust laws and hence the Court of Appeals is wrong.

Disclosure, Inc. is in a different position from the other defendants. Disclosure, Inc. is a subsidiary of Reliance Group, Inc. and was set up for the purpose monopolizing

the business of reproducing for sale to the public copies of all documents filed with the S.E.C. This is a sizable business since more than 100,000,000 pages of documents are sold annually to the public by Disclosure, Inc. See Address by Ray Garrett Jr., Chairman of the Securities and Exchange Commission, to the Society of Business Writers, May 6, 1975 p. 4.

The District Court *sua sponte* dismissed Sloan's complaint against Disclosure, Inc., stating that it was "frivolous", apparently because the rate charged by Disclosure, Inc. is 15 cents per page. (App. 19a). There is no authority which gives a district court the arbitrary power to dismiss an action *sua sponte* in the manner it did here and consequently this decision must be reversed.

On appeal, Disclosure, Inc. said that it had entered into a contract with the S.E.C. pursuant to the provisions of 41 U.S.C. §252(c)(10). It should be obvious, however, that this provision applies to situations where an agency of the government purchases property or services from a private enterprise. This statute clearly does not give an agency such as the S.E.C. the authority to create a monopoly and to grant to a private enterprise the exclusive right to sell copies of documents filed with the S.E.C. to the public. It is clear, therefore, that Disclosure's contract with the S.E.C. is legally involved and that Disclosure is not immune from antitrust liability. Therefore, the decision of the Court of Appeals should be reversed.

CONCLUSION

For all of the reasons set forth above this petition for a writ of certiorari should be granted.

Dated: July 14, 1976

Respectfully submitted,

SAMUEL H. SLOAN
Petitioner, pro se
917 Old Trents Ferry Rd.
Lynchburg, Va. 24503

Appendix

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 4, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 569—September Term, 1975.

(Argued February 19, 1976 Decided March 4, 1976.)

Docket No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & Co.,

Plaintiffs-Appellants,

—against—

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants-Appe"ees.

Before:

FEINBERG, OAKES and VAN GRAAFEILAND,

Circuit Judges.

Appeal from dismissal by United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, of complaint charging SEC and various others with numerous violations of the Constitution, the antitrust laws and other provisions of law.

Affirmed.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia, *for Appellants.*

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (David Ferber, Solicitor;

Thomas L. Taylor III, Attorney, on the brief), *for Securities and Exchange Commission.*

Naomi Reice Buchwald, Assistant United States Attorney (Thomas J. Cahill, United States Attorney for the Southern District of New York; Steven J. Glassman, Assistant United States Attorney, on the brief), *for United States of America.*

Rex W. Mixon, Jr., New York, N.Y. (Rogers & Wells, William F. Koegel, on the brief), *for National Quotation Bureau, Inc.*

Robert J. Woldow, Washington, D.C. (Jeffrey M. Silow, National Clearing Corporation; Lloyd J. Derrickson, National Association of Securities Dealers, Inc., Washington, D.C.; Breed, Abbott & Morgan, C. MacNeil Mitchell, New York, N.Y., on the brief), *for National Association of Securities Dealers, Inc., Bunker Ramo Corporation and National Clearing Corporation.*

Patricia Anne Williams, New York, N.Y. (Willkie Farr & Gallagher, Michael B. Targoff, on the brief), *for Disclosure Inc.*

Per Curiam:

Samuel H. Sloan appeals from a decision of the United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, dismissing his pro se complaint, which charged appellees with various violations

of the Constitution and the antitrust and securities laws, as well as with several common law torts.[1]

Sloan, a securities broker-dealer, has had more than his share of litigation in this court. In January 1974, he was found to have violated rules of the Securities and Exchange Commission (SEC) relating to record-keeping and net capital, and was enjoined from further violations. *SEC* v. *Sloan,* 369 F. Supp. 996 (S.D.N.Y. 1974). His appeal from this order was dismissed by this court, *SEC* v. *Sloan,* Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976), because Sloan was a fugitive from justice when the case came on to be heard, having apparently fled the jurisdiction to escape sentencing for contempt of a preliminary injunction restraining still further violations of SEC rules and requiring Sloan to permit SEC examination of his books and records. An appeal from this injunction was dismissed on the same day and on the same ground. *SEC* v. *Sloan,* Dkt. No. 75-7056 (2d Cir. Jan. 7, 1976).[2] Sloan's registration as a broker-dealer has been revoked by the SEC and he has been barred from association with any broker or dealer, Samuel H. Sloan, Securities Exchange Act Release No. 11376 (April 28, 1975), appeal docketed, *Sloan* v. *SEC,* Dkt. No. 75-4087, 2d Cir., May 7, 1975.[3]

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1 For simplicity, we have treated Samuel H. Sloan and Samuel H. Sloan & Co. as one plaintiff and one appellant. Appellees, in addition to the Securities and Exchange Commission, are the United States of America, National Quotation Bureau, Inc., Bunker Ramo Corporation, National Association of Securities Dealers, Inc., Disclosure Inc., and National Clearing Corporation.

2 A third Sloan appeal was also dismissed on that day, *SEC* v. *Canadian Javelin, Ltd.,* Dkt. No. 75-7046 (2d Cir. Jan. 7, 1976).

3 For other decisions arising out of Sloan's operations as a broker-dealer and the SEC's efforts to prevent his violations of its rules, see *Sloan* v. *Canadian Javelin, Ltd.,* Dkt. No. 75-7096 (2d Cir. Feb. 6, 1976); *Sloan* v. *SEC,* slip op. 213 (2d Cir. Oct. 15, 1975); *Sloan* v. *SEC,* Dkt. No. 75-4087 (2d Cir. June 12, 1975); *Sloan* v. *Ward,* Dkt. No. 75-3001 (2d Cir. Jan. 16, 1975).

In this action, Sloan mounts a massive though diffuse attack on the SEC and various private agencies in the securities industry. In effect, he challenges the legality of the entire structure of securities regulation in the United States. We agree with Judge Griesa that the attack is frivolous.

Count I of Sloan's lengthy complaint challenges the constitutionality of the Securities Exchange Act of 1934 and the rules and regulations promulgated under it. Sloan argues that the Act and rules constitute an unconstitutional delegation of legislative power; are overly vague; deprive him of liberty and property without due process of law; violate his right to contract; and exceed congressional power under the commerce clause. Some of these constitutional attacks on the authority of the SEC were raised by Sloan in this court on a previous occasion, and we then characterized his "blunderbuss attack" as "frivolous." *Sloan* v. *SEC*, slip op. 213, 215 (2d Cir. Oct. 15, 1975). We adhere to that view.

Count I also attacks a number of specific provisions of the regulatory scheme. For example, it charges that section 27 of the Act, 15 U.S.C. § 78aa, which vests in the federal courts exclusive jurisdiction of actions brought under the Act, is an unconstitutional interference with the jurisdiction of the state courts. But it has been established at least since *The Moses Taylor*, 71 U.S. (4 Wall) 411, 428-30 (1867), that Congress has the power to make federal jurisdiction exclusive. The other provisions of the Act and rules challenged by Sloan[4] are valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power, which infringe no constitutional rights of plaintiff.

4 Sections 12(g), 15(c)(5), 19(a)(4) of the Act, 15 U.S.C. §§ 78*l*(g), 78o(c)(5), 78s(a)(4), and Rules 15c2-11, 15c3-1, 17a-5, 17 C.F.R. §§ 240.15c2-11, 240.15c3-1, 240.17a-5.

The other main branch of Sloan's complaint is Count III, which charges the various non-governmental defendants with violations of the Sherman and Clayton Acts. But none of the actions charged constitute antitrust violations, essentially because they were taken pursuant to the scheme of securities regulation established by the Securities Exchange Act of 1934. See generally *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975).

We have also considered the other charges contained in the complaint and the various assignments of error made by Sloan on appeal,[5] and find no error in the dismissal of the complaint.

While we do not in this case invoke the provisions of Fed. R. App. P. 38 to assess penalties against appellant, we note that these are available, and may be appropriate if the same arguments which we have dismissed as frivolous are put before us again in the future.

The judgment of the district court is affirmed.

5 Many of the points made in Sloan's brief bear little relation to the decision appealed from. For example, Sloan argues that the SEC "is a suable entity" and that the district court had jurisdiction, while the district court did not mention either problem. Sloan also argues, among other things, that a default judgment should have been entered against the United States, that certain attorneys should have been disqualified because they were not members of the bar of the Southern District, that the Securities Acts Amendments of 1975 require vacation of the judgment below, and that the district court erred in not entering a preliminary injunction. None of these arguments has merit.

APPENDIX B
ORDER DATED APRIL 16, 1976 AMENDING THE OPINION OF MARCH 4, 1976 AND DENYING THE PETITION FOR A REHEARING

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 75-7283

SAMUEL H. SLOAN, SAMUEL H. SLOAN & CO.,
Plaintiffs-Appellants.

-against-

SECURITIES AND EXCHANGE COMMISSION, et al.,
Defendants-Appellees.

Upon the petition of plaintiffs-appellants for rehearing, it is hereby ordered that:

1. The petition for rehearing is denied.

2. The opinion is amended as follows:

(a) At *slip op. 2379*, at the end of line 11, insert a new footnote 1a. That footnote will read as follows:

In dismissing the appeal, the court cited United States v. Sperling, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

(b) At *slip op. 2380*, footnote 4:

(i) Insert before the present text of the footnote, the following:

At the time the complaint was filed, before the

Securities Acts Amendments of 1975, these were and make the initial "s" in "Sections" lower case.

(ii) At the end of the footnote, insert the following:

Former section 15(c)(5) is now section 12(k), 15 U.S.C. §78*l*(k), and former section 19(a)(4) has been repealed.

s/ Wilfred Feinberg

s/ James L. Oakes

s/ Ellsworth Van Graafeiland
U.S.C.J.J.

April 16, 1976

APPENDIX C
ORDER DATED APRIL 16, 1976 DENYING THE SUGGESTION THAT THE REHEARING BE IN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of April, one thousand nine hundred and seventy-six.

SAMUEL H. SLOAN, et al,
Plaintiffs-Appellants,

V

SECURITIES & EXCHANGE COMMISSION, et al,
Defendants-Appellees.

75-7283

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX D
ORAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK RENDERED ON FEBRUARY 14, 1975

(THOMAS P. GRIESA, D.J.)

This is an action by Samuel H. Sloan and Samuel H. Sloan and Co., a sole proprietorship, against the SEC, the National Quotation Bureau, Inc., the National Association of Securities Dealers, Inc., Bunker Ramo Corporation, National Clearing Corporation and an entity named as Disclosure Inc.

The caption also names as a defendant the United States of America as the Securities and Exchange Commission, although it appears that the United States of America has not been served.

The complaint originally filed in this action was dismissed by me on September 18, 1974, with leave to replead. An amended complaint was subsequently filed and there are numerous motions addressed to it now.

Let me briefly summarize the motions.

On January 10, 1975, I signed an order to show cause for the plaintiff, bringing on an application by the plaintiff for a preliminary injunction to require the National Quotation Bureau to list plaintiff in the so-called pink sheets and yellow sheets.

On January 31, 1975, the SEC filed a motion to dismiss the amended complaint. On the same date, the National Association of Securities Dealers, Bunker Ramo Corporation and National Clearing Corporation, filed a motion to dismiss the complaint.

On February 3, 1975, the National Quotation Bureau,

Inc., filed a motion to dismiss the complaint.

On February 5, 1975, the plaintiff filed a motion seeking three forms of relief: First, the plaintiff sought a preliminary and permanent injunction enjoining the SEC from instituting and prosecuting actions for injunctive relief, from promulgating and enforcing rules and regulations, from conducting investigations and from undertaking any acts or practices under color of the Securities Exchange Act of 1934 or rules or regulations promulgated thereunder. The asserted ground for this broad request for relief was that the existence of the Securities and Exchange Commission is repugnant to the constitution.

Second, plaintiff asked summary judgment on the amended complaint.

Third, plaintiff requested the convening of a three-judge court.

On February 7, 1975, the plaintiff filed a motion to disqualify certain persons—Dennis C. Hensley, Lloyd J. Derrickson and Robert Waldow—from acting as attorneys for Bunker Ramo Corporation, National Association of Securities Dealers and National Clearing Corporation.

There was also a request to disqualify George W. Brandt, Jr. as acting as counsel for National Quotation Bureau.

There was also a request for an order directing the office of the United States Attorney to appear on behalf of the United States of America or for a default judgment against the United States.

On February 13, 1975, the plaintiff filed a motion to disqualify Thomas L. Taylor, III, from appearing as counsel for the Securities and Exchange Commission.

I am denying the plaintiffs' applications in toto and I am granting the motions of the SEC, National Association of Securities Dealers, National Clearing Corporation, Bunker Ramo and National Quotation Bureau to dismiss the complaint.

After I get through stating my decision and reasons on the above motions, I will deal with the posture of Disclosure Inc., as to whom there is no formal motion before me at this time.

The basic thrust of the action is that plaintiff challenges the constitutionality of the Securities Exchange Act of 1934, challenges the existence of the Securities and Exchange Commission and the constitutionality of all rules and regulations promulgated by that body.

The plaintiff is engaged in combat with the SEC, which has taken a number of channels, of which this action is only one.

As we have discussed this afternoon, the SEC is engaged in an administrative proceeding against plaintiff Sloan and his company to revoke his broker-dealer registration. Although the papers are not here, it is represented to me that the claim is that the plaintiff has violated the net capital requirements of SEC Rule 15c3-1, and that he has also violated the informational requirements of Rules 17a-3, 17a-4 and 17a-5.

The SEC has also sued Sloan and Company in an action which was assigned to Judge Ward of this court and in which a permanent injunction was entered, requiring plaintiff to desist from acting as a broker-dealer in violation of Rules 17a-3, 17a-4 and 15c3-1. The number of the case is 71 Civil 2695, and is reported as *SEC v. Sloan et al.*, 369 Fed. Supplement 996 (SDNY 1974).

I am advised that Sloan has appealed from the administrative judge's initial decision in the SEC proceeding revoking his broker-dealer registration and that he has also appealed from the permanent injunction granted by Judge Ward in the case in this court.

There is a second action before Judge Ward now pending which involves questions of violations of Rules 17a-4 and 15c2-11, the latter dealing with the making of quotations. There a preliminary injunction has been entered against plaintiff.

As I indicated, the basic claim in the case before me is that the Securities Exchange Act of 1934 and the SEC rules issued thereunder are unconstitutional. The claim is that there is an unconstitutional delegation of power to the SEC and that the Exchange Act and Rules are unconstitutionally vague and deprive the plaintiff of liberty and property without due process of law and violate his right to contract.

There are specific attacks made upon specific provisions of the statute and specific SEC rules. Particularly, it is claimed that the statutory provisions of the 1934 Act providing for suspension by the SEC of trading in securities are unconstitutional. These sections are 15(c)5 and 19(a)4, which give the Securities and Exchange Commission the authority to suspend the trading in a security for a period not exceeding 10 days, if such suspension in the opinion of the Commission is in the public interest and the protection of investors so requires. There is also an attack upon Section 12(g) of the 1934 Act and the rules thereunder for filing Form 10-K and other forms with the SEC.

Three SEC rules are also specifically attacked in the action, that is Rule 17a-5, which I referred to earlier, Rule 15c2-11, and Rule 15c3-1. Rule 17a-5 provides for the

filing of certain financial statements by broker-dealers and Rule 15c2-11 places certain conditions on the ability of a broker-dealer to publish a quotation for a security, that is, before a quotation can be published by a broker-dealer, the issuer of the security must have on file the necessary registration statement and so forth. Rule 15c3-1 is the net capital rule.

As far as the general attack upon the Exchange Act of 1934 and the general attack upon the existence of the SEC and the ability of the SEC to promulgate rules and regulations regarding the securities business, the matter has been for so long and so conclusively established against the plaintiff's position that further discussion is unnecessary.

With regard to the specific statutory sections and specific SEC rules referred to in this action, some further brief mention is necessary. These are Sections 15(c)(5) and 19(a)(4) and 12(g) and Rules 15c2-11, 15c3-1 and 17a-5. No cogent reason has even been suggested for the invalidity of these provisions. As already indicated, the arguments about improper delegation of power to the SEC are long since foreclosed. The arguments about unconstitutional vagueness are patently frivolous in the case of the rules referred to, and, in the case of the suspension of trading sections of the statute, are foreclosed by analogous case law. *Wright v. SEC*, 112 F. 2d 89, 94-95 (2d Cir. 1940), and *American Sumatra Tobacco Corp. v. S.E.C.*, 110 F. 2d 117 (D.C. Cir. 1940). Plaintiff, not being an issuer of securities has no standing to attack Exchange Act 12(g) or the rules thereunder.

Certain other elements of the action do require discussion, and for this purpose a brief factual introduction is required.

Plaintiff apparently is suing in this action primarily as a market-maker for over-the-counter stocks. Although his complaint is long and contains much irrelevant matter, it seems to me that the basic thrust of the complaint can be summarized as follows:

He complains that as a market-maker he is impaired because he is not able to participate in bidding on the electronic bidding process provided for by what is known as NASDAQ.

To back up a moment, one of the defendants is the well known NASD, which is an association of securities dealers who trade in over-the-counter stocks, and this association exists under the authority of Section 15A of the Exchange Act of 1934.

Section 15A is the so-called Maloney Act. In order to provide for the handling of quotations and bidding between the dealers, by use of electronic technology, the NASD has contracted with defendant Bunker Ramo to set up the system known as the NASDAQ.

Under the applicable rules, the only people who can participate on the NASDAQ in the sense of bidding through this device are members of the NASD. The plaintiff is not a member of the NASD. It is stated in the complaint that he does not want to become a member of the NASD and the reason he does not want to do this is because he objects to the requirement of the NASD that its members agree to arbitration of disputes among themselves and with customers.

Another complaint which the plaintiff has about the NASDAQ is that it is too expensive for smaller traders such as himself. Here he makes an antitrust claim against Bunker Ramo and the NASD, claiming price fixing and monopolization.

Another basic branch of the plaintiff's complaint is the claim that he has lost in various ways because many of the stocks in which he has been a market-maker or been otherwise interested, many of these stocks have been suspended from trading by the SEC under the statutory provisions which I have referred to earlier.

Another phase of the complaint is a claim against the National Quotation Bureau. The National Quotation Bureau is basically a publication service which puts out the so-called pink sheets and yellow sheets which contain quotations for over-the-counter stocks and bonds. This was the system which was apparently universally relied on in the over-the-counter market prior to the time when the electronic bidding process of the NASDAQ came into being. Apparently there are still some securities which are referred to in the pink or yellow sheets which are not carried on the electronic device. In any event, since plaintiff is not a bidder on the electronic device, he seeks to use the pink sheets and he claims that he has a grievance against the Quotation Bureau respecting the pink sheets. He claims that he was kept off of the pink sheets for a time for failure to pay a bill of $1700 to the National Quotation Bureau, but concedes that subsequently he was reinstated in the pink sheets upon payment of the amount due.

He has a current problem about the pink sheets because Judge Ward in a current litigation against plaintiff has preliminarily enjoined plaintiff from making quotations under certain circumstances and this prevents the plaintiff from utilizing the pink sheets for quotations.

Plaintiff concedes that he is now restrained by Judge Ward's order from initiating over-the-counter quotations on the pink sheets, but he claims the right to have particular securities and his name listed on the pink sheets without quotations.

In addition to the above claims which I have discussed, plaintiff lists a number of specific grievances alleged against the SEC.

For instance, it is claimed that the SEC or investigators for the SEC questioned the plaintiff's secretary, the plaintiff's mother, and a former employee of the plaintiff.

None of these claims are sufficient, and the complaint must be dismissed.

The claim against the NASD and Bunker Ramo regarding the NASDAQ is legally invalid.

From the allegations in the complaint and the other papers before me, it appears clear that what plaintiff is complaining about regarding the requirements for participation in the NASDAQ and the fixing of charges for the usage of the NASDAQ are matters stemming from NASD rules and regulations promulgated under the Maloney Act.

There is a specific provision for challenging such rules and regulations by resort to the SEC and by further resort to the Court of Appeals. Exchange Act, Section 15A(a) et seq; Section 15A(k), Section 25.

If plaintiff indeed has a valid claim on these matters, his remedy is with the SEC and in the Court of Appeals. In such a proceeding, the SEC and the Court of Appeals would be empowered to take competitive considerations, among other things, into account. Exchange Act Section 15A(b)(8). Antitrust claims of the kind brought by plaintiff will not lie, Exchange Act Section 15A(n). See also *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302-303, note 13 (1973).

The claim for losses from suspension of trading is covered by my earlier discussion as to the validity of the statutory provisions governing such suspension. There is

nothing from which a case could be made out that the SEC's actions were not within the statutory authorization. Indeed it is alleged that in most cases the SEC suspends trading of securities because of the failure of the issuer to file and keep the necessary financial records.

The claim relating to the National Quotation Bureau is patently frivolous. There was a temporary inability to participate on the pink sheets because of non-payment of bills. Apparently the bills were paid. The only claim currently pending or currently made in this action is the refusal of the Quotation Bureau to carry lists of securities and carry plaintiff's name without the quotations. There is no merit whatsoever in such a claim.

With regard to the various allegations about SEC investigative activities, etc., these are little more than narrative coloration. They offer nothing sufficient in the way of allegations of wrongdoing, or resultant injury to plaintiff.

One further matter which should be covered relates to the defendant National Clearing Corporation. The National Clearing Corporation is a body set up under auspices of the NASD to efficiently handle the clearing of securities transactions in over-the-counter securities. It appears that plaintiff is not a member of the NCC because he is not a member NASD and that NASD membership is indeed required for participation and membership in the NCC. Again, this is a matter of NASD rules and if the plaintiff wants to challenge those rules, his remedy is with the SEC and in the Court of Appeals, not in an action in this court.

I should also note that Count IV of the complaint asserts a particularly irrational claim against certain defendants under Section 10(b) of the 1934 Act and Rule 10b-5. This merits no discussion.

Now, I think that disposes of all the motions that I have referred to and that leaves only the status of Disclosure, Inc.

What do we do about them?

MS. WILLIAMS: Your Honor, Disclosure, Inc. is sued in this matter as a sort of a tag-along party. We are named in precisely six paragraphs of the 309 in the complaint, four of which are the only ones which could be deemed to be concerned with substantive allegations.

We are sued under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

THE COURT: What is Disclosure, Inc.

MS. WILLIAMS: Disclosure, Inc. is a private corporation which performs duplicating services of various and sundry documents.

THE COURT: For whom?

MS. WILLIAMS: For the public as well as for the SEC. It holds a contract.

THE COURT: Am I correct, if you want to get documents on file with the SEC, you apply to the SEC and then Disclosure, Inc. does the work; they do the duplicating?

MS. WILLIAMS: Disclosure, Inc. will do duplicating and the SEC also itself provides machines in its offices, public machines for duplicating materials.

THE COURT: Where are you referred to in the complaint?

MS. WILLIAMS: Paragraphs 11, 213 through 215, 290 and 297. The substantive paragraphs are 213 through 215 and initial paragraph 11. They are on pages 27, 28, 36, 38 and page 3.

THE COURT: Is it a claim of excessive rate?

MS. WILLIAMS: Yes, sir.

THE COURT: What is the rate?

MS. WILLIAMS: 15 cents per page.

THE COURT: That's frivolous. I'm simply going to dismiss it.

All right. Thank you very much.

MR. SLOAN: Your Honor, there was one motion, my motion for disqualification of Mr. Taylor, not being a member of the bar of this court.

THE COURT: I have denied all of those disqualification motions. There is no discussion necessary. Those are absolutely frivolous.

I wish to make it clear that I am dismissing this complaint without leave to replead. There has been one opportunity to replead and no further opportunity will be granted.

All motions will be endorsed in accordance with this decision.

I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

s/ John H. Kruppel
Official Court Reporter
U.S. District Court

APPENDIX E
JUDGMENT ENTERED BY THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ON FEBRUARY 26, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL H. SLOAN

-against-

SECURITIES AND EXCHANGE COMMISSION
UNITED STATES OF AMERICA as the
SECURITIES & EXCHANGE COMMISSION
NATIONAL QUOTATION BUREAU, INC. 74 Civil 2792
BUNKER RAMO CORP.
NATIONAL ASSOCIATION OF
SECURITIES JUDGMENT
DEALERS INC.
DISCLOSURE, INC.
NATIONAL CLEARING CORP.

The defendant Securities and Exchange Commission having moved the Court to dismiss the action against it for lack of jurisdiction and for failure to state claim upon which relief can be granted pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Thomas P. Griesa, United States District Judge, and the Court thereafter on February 24, 1975, having handed down its memorandum granting the said motion as to all defendants, it is,

ORDERED, ADJUDGED and DECREED: that defendants SECURITIES EXCHANGE COMMISSION, et al., have judgment against SAMUEL H. SLOAN, dismissing the complaint without leave to replead.

Dated: New York, N.Y.
February 26, 1975.

s/ Raymond Burghardt
Clerk

APPENDIX F
OPINION DATED MAY 10, 1976 OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN A RELATED CASE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 776—September Term, 1975.

(Argued April 27, 1976 Decided May 10, 1976.)

Docket No. 75-6106

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

—against—

SAMUEL H. SLOAN, individually and d/b/a SAMUEL H. SLOAN & Co.,

Defendants-Appellants.

Before:

LUMBARD, WATERMAN and FEINBERG,

Circuit Judges.

Appeal from various orders of United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in course of suit to enjoin violations of SEC rules.

Affirmed in part, dismissed in part.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia, *for Defendants-Appellants.*

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (Thomas L. Taylor, III, Attorney, on the brief), *for Plaintiff-Appellee.*

PER CURIAM:

Samuel Sloan, a securities broker-dealer who is a frequent litigant in this court, see *Sloan* v. *SEC*, slip op. 2377, 2379 & nn. 2, 3 (2d Cir. March 4, 1976), and cases there cited, appeals from a number of orders of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in the course of a continuing lawsuit in which the Securities and Exchange Commission (SEC) seeks to enjoin him from violation of various SEC rules requiring maintenance of proper books and records and making them accessible for inspection by SEC officials.[1] We affirm in part and dismiss in part.

The most significant order challenged by Sloan on this appeal, to which he devotes most of his lengthy brief, is an order dated September 3, 1975 holding him in civil contempt for failing to comply with a preliminary injunction granted by Judge Ward on January 17, 1975.[2] The injunction required Sloan, among other things, "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of [his] books and records." An appeal from this

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1 This is not the first such action taken by the SEC against Sloan. See *SEC* v. *Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976).

2 The September 3 order adjudged Sloan in civil contempt and gave him 20 days to purge himself. When he did not, a further order of civil contempt was entered on September 26, 1975 ordering Sloan's arrest.

injunction was dismissed by this court on January 7, 1976. *SEC* v. *Sloan,* Dkt. No. 75-7056.[3]

The order from which Sloan now seeks to appeal is both in form and in substance an order of civil contempt. An order of civil contempt against a party to the litigation is not an appealable final order. 9 Moore, Federal Practice ¶ 110.13[4]. Moreover, after filing and briefing this appeal, Sloan purged himself of contempt, and on February 4, 1976, Judge Ward entered an order to this effect. Thus, no live controversy remains as to any of the alleged errors in the contempt adjudication, and the appeal from the order of contempt is moot.

Sloan also argues that the district court's refusal to dismiss the SEC's complaint on various grounds, and the grant to the SEC of a protective order as to certain interrogatories, were erroneous. Neither is an appealable final order. 9 Moore, Federal Practice ¶ 110.08[1] at n.33 and cases there cited; *UAW* v. *National Caucus of Labor Committees,* 525 F.2d 323, 324 (2d Cir. 1975), and cases there cited. Moreover, Sloan's notice of appeal does not refer to the protective order, dated August 4, 1975. These aspects of the appeal are therefore dismissed for lack of jurisdiction.

Another ruling appealed from is Judge Ward's refusal to hold the SEC in contempt for allegedly violating an oral order restricting the parties' press releases. Assuming that such an order is appealable at all, we note that the district judge found that the particular press release that was the subject of Sloan's motion did not violate his order. We see no basis for substituting our judgment for that of the district judge in interpreting his own order.

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3 We cited *United States* v. *Sperling,* 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

We also affirm Judge Ward's refusal to disqualify and disbar counsel for the SEC. While such an order is appealable, *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.,* 496 F.2d 800 (2d Cir. 1974) (en banc), we have held that the supervision of attorneys is a matter primarily for the district court, whose findings will be upset only on a showing of abuse of discretion. *Hull* v. *Celanese Corp.,* 513 F.2d 568, 571 (2d Cir. 1975). We see no abuse of discretion here. Sloan also argues that the SEC attorneys should be disqualified because the SEC lacks authority to prosecute actions on its own behalf, and that *SEC* v. *Robert Collier & Co.,* 76 F.2d 939 (2d Cir. 1935), which holds that it has such authority, should be overruled. We see no sufficient reason to overturn a persuasive decision by a distinguished bench.

Finally, Sloan appeals from the denial of his motion to enjoin the SEC from "harrassment and annoyance of the defendant herein." Sloan apparently would have us treat this motion as in effect a complaint or counterclaim charging violations of his constitutional rights, and seeking a preliminary injunction. On that theory, the order denying the injunction would be appealable. 28 U.S.C. § 1292(a)(1). Moreover, such a denial would have required findings of fact and conclusions of law under F.R. Civ. P. 52(a), which were not made by the district court. On the other hand, the papers do not purport to be pleadings, and in the circumstances of this litigation, the district judge apparently considered the motion as one addressed to "the district court's power to control the proceedings before it," 9 Moore, Federal Practice ¶ 110.19[1] at 207-08, and thus not a request for an injunction governed by the Rule and statute cited above. We agree that the motion here was more in the nature of a request for a protective order.

The order denying it is therefore interlocutory and non-appealable.

Accordingly, as indicated above, the appeal is dismissed as to certain of the rulings appealed from; in all other respects, the rulings of the district court are affirmed.